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Supreme Court, U.S.
FILED
DEC 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

REICHHOLD CHEMICALS, INC.,
Petitioner,

vs.

GERARD A. CASSINO and SALLY CASSINO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL AS AMICUS CURIAE IN SUPPORT OF THE PETITION

BRIEF OF AMICUS*

INTEREST OF AMICUS

The California Employment Law Council ("CELC" or "*amicus*") is a voluntary, nonprofit organization composed of more than 60 employers. CELC's members employ more than 400,000 persons and represent a broad segment of the employer community in California. *Amicus* was formed to promote the common interests of employers and the public in sound procedures and laws pertaining to employment

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* Consent letters from the parties have been filed with the Clerk.

practices. Petitioner Reichhold Chemicals, Inc. is not a member of CELC.[1]

Many members of *amicus* offer settlement agreements, such as the one at issue herein, to their employees upon layoff or termination. Under these agreements, employees are given enhanced severance benefits in exchange for the release of any potential claims arising from their employment or termination, including discrimination claims. *Amicus* is concerned about the detriment to both employers and employees of permitting such agreements to be introduced as evidence of intentional age discrimination. Under such a rule of law, no one will benefit. Employers will be discouraged from offering valuable benefits; employees will be deprived of the freedom voluntarily to release claims in order to obtain such benefits; and the public and courts will be burdened with additional litigation. Accordingly, *amicus* files this brief urging reversal of the court of appeals.

REASONS FOR GRANTING THE WRIT

This case involves much more than a mere evidentiary question. The Ninth Circuit's decision, affirming District Judge Jack Tanner, will have profound practical significance for employers and employees alike. Many employers follow the salutary practice of offering valuable severance packages to laid-off or terminated employees in exchange for releases of legal claims. Under the Ninth Circuit's rule, such offers can be used as substantive

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[1] Counsel for *amicus* represents petitioner Reichhold in some matters, and indeed represented Reichhold at an earlier stage of this lawsuit. Paul, Hastings, Janofsky & Walker no longer represents petitioner in this suit, and *amicus'* interest in this case is because of the question presented, not the identity of any party.

evidence of willful discrimination. If the Ninth Circuit's view is correct, employers will be deterred from making such offers. Thus, what is at issue here is the survival of a practice — beneficial to employers, employees, courts and the public — designed to obviate employment litigation.

I

STATEMENT OF THE CASE AND SUMMARY OF POSITION

A. Statement of the Case.

The key facts are simple. Reichhold Chemicals offered Gerard Cassino substantial severance benefits, to which he was not contractually entitled, in exchange for a release of legal claims. Cassino rejected the offer, which was his privilege. At trial, the offer and proposed settlement agreement were introduced over Reichhold's objection. *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1341-42 (9th Cir. 1987).[2] The Ninth Circuit, affirming in relevant part, held that the unexecuted settlement agreement was (1) probative of discrimination; (2) not rendered inadmissible, as an offer of settlement, by Federal Rule of Evidence 408;[3] and (3) evidence of Reichhold's *willful* violation of the Age Discrimination in Employment Act (ADEA), because Reichhold's proposed agreement contained language specifically releasing age discrimination rights.

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[2] Reichhold objected on the grounds that Federal Rule of Evidence 408 barred the settlement agreement's admission and, alternatively, that its probative value, if any, was outweighed by its prejudicial effect under Rule 403.

[3] The Ninth Circuit did not address the applicability of Rule 403.

B. Summary of Position.

There is no legal precedent or logical basis for the Ninth Circuit's holding.[4] Employees of course are privileged to reject settlement offers and sue their employers. The critical issue is whether, merely because an employer *proposes* such an arrangement contemporaneous with an employee's termination, that offer should be treated as an admissible concession of guilt. The Ninth Circuit's resolution of that issue threatens the vitality of a common, practical and desirable employment practice. *Amicus* therefore urges the Court to grant the petition and reverse the court of appeals.

II

REVIEW IS NECESSARY TO PRESERVE A SALUTARY EMPLOYMENT PRACTICE DESIGNED TO OBVIATE EMPLOYMENT LITIGATION

A. The Provision of Enhanced Severance Benefits for the Release of Legal Claims is a Practical and Desirable Employment Practice.

It is common practice for companies to offer terminating employees severance benefits in addition to those the companies are obligated to provide by contract or company policy. The standard procedure in offering special severance packages is for the company to obtain a written release of claims in exchange for the extra benefits. This arrangement

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[4] No published opinion prior to the Ninth Circuit's here has allowed into evidence a settlement agreement to demonstrate an employer's intent to discriminate.

mutually benefits employers and employees, and advances the public policy favoring the voluntary resolution of employment disputes.

1. Settlement agreements benefit employers.

The practice of negotiating releases of employment claims is important for employers for two reasons. First, a sluggish economy and foreign competition have forced companies to undertake efficiency-enhancing and cost-cutting measures. Business reorganizations are common; reductions-in-force, leading to terminations and layoffs, unfortunately are sometimes unavoidable. Second, there has been an explosion of employment litigation in the past decade.[5] Some claims are meritorious; some are not. Either way, the costs of defense alone can be staggering. A company's attorneys' fees easily can run into the mid-six figures in a single case.[6] Thus, even if employers "win," they lose.

Employers legitimately wish to protect themselves from litigation costs and risks. Settlement agreements and releases provide such protection. Assured that litigation

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[5] For example, EEOC data reveal that there has been a dramatic increase in the number of age discrimination claims filed in the last several years. In fiscal year 1986, nearly two and one-half times as many charges (26,549) were filed with the EEOC and state fair employment practice agencies as in fiscal year 1980 (11,076). Bureau of National Affairs, *Older Americans in the Work Force: Challenges and Solutions*, 123-24 (1987).

[6] Win or lose, companies have been required to spend from $50,000 to $250,000 to defend employment cases. *E.g.*, Copeland, *The Revenge Of The Fired*, Newsweek, Feb. 16, 1987, at 46-47. Even litigation which is resolved "expeditiously" on summary judgment can cost an employer $30,000 to $50,000 or more in attorneys' fees.

will be avoided, an employer is able to redirect money from its lawyers to its former employees. The money eases the financial impact of separation from a company and assists employees searching for new jobs.

2. Settlement agreements benefit employees.

By offering terminating employees the option of obtaining enhanced severance packages in exchange for a release of claims, companies maximize their employees' freedom of choice. Most terminating employees never have or assert claims arising from their employment. For these employees, the only effect of being offered a severance package is positive: they have an option to receive valuable benefits to which they otherwise would not be entitled. *Henn v. National Geographic Society*, 819 F.2d 824, 826 (7th Cir. 1987) (employee is better off with the severance offer, because he has an extra option).

Even for employees bent on litigation, there is no disadvantage in being offered a termination package. Settlement offers do not compel settlement; they simply give the employee a choice. If an employee does not believe the proposal is adequate, he or she can reject it, as did Cassino in this case.

The Ninth Circuit's real concern apparently is that employers will use "coercive" tactics or otherwise engage in "overreaching." 817 F.2d at 1343.[7] These concerns,

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[7] The EEOC's recent experience is to the contrary; it indicates that most individuals apparently are satisfied with the settlement benefits they receive from their former employers. In one study, only 8% of those who signed settlement agreements releasing ADEA claims later had any desire to challenge them. Silverman & Bolick, *The EEOC's Proposed Rule on Releases of Claims Under the ADEA*, 37 Lab. L. J. 195, 200 (1986).

however, are applicable to the enforceability of releases that are *signed*, not to the admissibility of offers that are *rejected*.[8]

3. Settlement agreements are in the public interest.

Two overriding public policy goals underlie the ADEA. One is to encourage consensual resolution of employment disputes. Settlement of discrimination claims unquestionably is the preferred method of resolving them. *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (Congress expressed a "strong preference for encouraging voluntary settlement of employment discrimination claims"); 42 U.S.C. § 2000e-5(b) (1981) ("informal . . . conference, conciliation, and persuasion" of discrimination

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[8] A settlement offer is of no effect, and will not impair an employee's legal rights in any way, unless it is (1) accepted, and (2) enforceable. The present case by definition involves an offer that was rejected. The offer never became binding and could not possibly prejudice Cassino. Even if the offer had been nominally accepted it would not have been binding unless the acceptance was knowing and voluntary. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (Title VII rights may be waived if release is "knowing and voluntary"). Under the EEOC regulations, a waiver of ADEA rights will be deemed knowing and voluntary if:

> [i] The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;
>
> [ii] A reasonable period of time was provided for employee deliberation; [and]
>
> [iii] The employee was encouraged to consult with an attorney.

52 Fed. Reg. 32,293, 32,294 (Aug. 27, 1987), *to be codified at* 29 C.F.R. § 1627.16(c)(2). The release offered in this case met these criteria.

claims is required before resort to litigation is permitted); 29 U.S.C. § 626(d) (1985) (same).[9]

A second principal objective of the ADEA is to ensure the expeditious resolution of age claims. Older workers by definition have less time remaining in which to pursue careers. *E.g., Burns v. Equitable Life Assurance Society*, 696 F.2d 21, 24 n.2 (2d Cir. 1982), *cert. denied*, 464 U.S. 933 (1983). Prompt resolution of potential claims is in employees' interest.

Settlement agreements such as the one offered Cassino plainly further both of these public policy goals. Such agreements effect prompt and informed resolution of employment disputes and further the mutual interests of employees and employers by providing additional compensation immediately to employees who freely choose to release claims they might have.

The EEOC endorses this salutary employment practice; it does so precisely because it fosters the amicable and expeditious resolution of age and other discrimination disputes, without agency supervision. After two years of rulemaking, the EEOC recently promulgated a regulation endorsing the practice of enhancing severance benefits in consideration for the waiver of ADEA claims. *EEOC: Legislative Regulation and Administrative Exemption Allowing For Non-EEOC Supervised Waivers Under the*

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[9] The preference for informal conciliation was emphasized repeatedly by sponsors of the ADEA. *See, e.g., Age Discrimination in Employment: Hearings on S. 830 and S. 786 Before the Subcomm. on Labor of the Senate Comm. on Public Welfare*, 90th Cong., 1st Sess. 89 (1977), ("the best relationship is voluntary") (remarks of Sen. Yarborough); 123 Cong. Rec. S. 17275 (Daily ed. Oct. 19, 1977) (the ADEA should allow the employee to "resolve the dispute himself or work out a compromise with an employer") (statement of Sen. Williams).

ADEA, 52 Fed. Reg. 32,293, 32,294 (Aug. 27, 1987) (hereinafter *ADEA Waivers*), *to be codified at* 29 C.F.R. § 1627.16. *See* note 8 *supra*. As a result, the EEOC is able to allocate its limited resources to assisting those individuals who truly want to litigate discrimination charges.[10] Accordingly, settlement agreements, such as the one offered Cassino, strike an intelligent and positive balance between an employer's legitimate business interests, an employee's freedom of choice, and the public's interest in the effective enforcement of the employment discrimination laws.

B. The Ninth Circuit's Decision Impedes the Voluntary Settlement of Employment Claims and Leads to Absurd Results.

The Ninth Circuit was simply wrong in concluding that requesting a legal release in exchange for special severance is probative of age discrimination. And, even if the court were correct on that point, its decision still is bad law and bad policy. If an employer's severance-package offer later can be used as affirmative evidence of discrimination, employers will be deterred from making such offers.

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[10] Under the regulation, which embodies Title VII and ADEA case law, settlement agreements do not preclude the EEOC from assessing an agreement's validity or verifying that it preserves an employee's *prospective* rights or claims and is supported by adequate consideration. Moreover, such settlement agreements cannot limit the EEOC's rights and responsibilities to enforce federal employment discrimination laws, nor interfere with the right of an employee to file a charge or participate in an EEOC investigation. *ADEA Waivers* at 32,294.

1. Settlement offers are not probative of discriminatory intent.

The Ninth Circuit held that settlement agreements such as that offered to Cassino constitute "probative [evidence] on the issue of discrimination." 817 F.2d at 1342. The Ninth Circuit's conclusion is legally unprecedented.[11] It also is logically flawed. If offering a release demonstrates an intention to discriminate, then fastening one's automobile seat belt demonstrates an intention to cause an accident. Releases, like seat belts, are a form of insurance. By obtaining a release in consideration for valuable severance benefits, an employer can avoid spending time and money in the defense of employment litigation. The Ninth Circuit's error was its failure to understand that releases buy peace, and that employers are willing to pay money for peace even

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[11] None of the cases cited by the Ninth Circuit support its conclusion that settlement agreements offered at termination are admissible to prove discriminatory intent. In *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987), and *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986), the Eighth Circuit upheld the validity and enforceability of release agreements proffered to employees at termination and prior to the assertion of age discrimination claims. The termination agreements in those cases appear in the record not because they were probative of discrimination, but simply because they constituted the successful affirmative defense to the respective plaintiffs' age discrimination claims. In *Pruet Production Co. v. Ayles*, 784 F.2d 1275 (5th Cir. 1986), and *Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312 (5th Cir. 1986), the Fifth Circuit rejected the discrimination claims of the plaintiff employees. The *Pruet* court did not address the issue of whether the release had any probative value; the *Sherrod* court expressly noted that no connection whatsoever had been shown between the release and any discriminatory intent of the employer. 785 F.2d at 1315.

though firmly convinced they have done nothing unlawful.[12]

2. It is irrelevant when, or how, settlement negotiations arise.

The Ninth Circuit conditioned the admissibility of settlement agreements on arbitrary distinctions of when and how such negotiations arise. Under its view, settlement agreements tendered to employees at the time of termination are not "settlement offers" within the meaning of Federal Rule of Evidence 408. On the other hand, offers tendered *after* an employee articulates a potential claim, apparently are protected by the Rule.

The EEOC and at least four courts of appeals have concluded that an agreement, such as that offered to Cassino, *when executed* is a valid settlement agreement that will bar an age discrimination claim.[13] Under the Ninth Circuit's view, however, such an offer *if rejected* is not protected by Rule 408. Employers thus face a risky, all-or-nothing proposition. If the employee voluntarily accepts the employer's severance package and signs a release, then the employer will be afforded full protection against the later assertion of employment-related claims. If, however, the

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[12] *See* note 6 and accompanying text *supra*. Indeed, the Rules Advisory Committee specifically noted that an offer to settle is irrelevant for purposes of establishing liability since it "may be motivated by a desire to buy peace rather than any concession of weakness of position." Fed. R. Evid. 408, Notes of Advisory Comm. on Proposed Rules.

[13] *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 107 S. Ct. 178 (1986); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987); *Sullivan v. Boron Oil Co.*, 831 F.2d 288 (3d Cir. 1987); 29 C.F.R. § 1627.16(c)(1).

employee does not accept, the offer may be admitted against it to prove an intent to discriminate.

This makes no sense. A settlement offer is a settlement offer. The essential nature of the offer is not transmuted simply because the employee chooses not to accept it. It does not follow that an employer's otherwise-enforceable offer loses the protection of Rule 408 simply because the employee turns it down.

The Ninth Circuit attempted to justify its decision by saying that employers' offers gain the protection of Rule 408 only when made in response to an employee's asserted claim.[14] But the timing of the offer is not consequential. When an employee is notified of termination, the facts which potentially could give rise to litigation already exist and generally are known. In addition, an employer, by offering a settlement agreement and release, brings the potential for litigation to the employee's attention. The settlement agreement, in order to be valid, must even identify the rights or claims that the employee is being asked to waive. *E.g.*, 29 C.F.R. § 1627.16(c)(2). And the

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[14] As the Ninth Circuit attempted to explain: "[T]he protections of Rule 408 were designed to encourage the compromise and settlement of *existing disputes*." 817 F.2d at 1343 (emphasis added). But an enforceable settlement agreement *by definition* settles an "existing dispute." Only "existing disputes" lawfully can be settled under the ADEA. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 860 (5th Cir. 1975) (only bona fide factual disputes can be settled), *cert. denied*, 425 U.S. 944 (1976); *see Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1044 (6th Cir.) (en banc) (motive behind discharge is a factual dispute that can be settled), *cert. denied*, 107 S. Ct. 178 (1986). *Amicus* demonstrated above that the agreement when signed *is* a valid waiver. *See* note 13 and accompanying text *supra*. If an *executed* settlement agreement is enforceable — and it is — then a *proposed* settlement that is rejected nevertheless covers an "existing dispute" and retains the protection of Rule 408.

employer must specifically "encourag[e] [the employee] to consult with an attorney." *Id.*[15] Thus, the Ninth Circuit's rule — conditioning the admissibility of a settlement offer on *who* first broaches the subject of litigation — is both arbitrary and unrealistic.

This rule also will lead to absurd results. Consider two employees who are laid off in a reduction-in-force. Neither employee was the victim of discrimination. One employee, however, asserts a frivolous legal claim. The employer then can offer extra severance pay to that employee in exchange for a release and, under the court of appeals' decision, evidence of the settlement offer is inadmissible if the employee rejects the deal and sues. The second employee, however, cannot receive any such offer, because he was unwilling to assert a frivolous claim. The Ninth Circuit's rule thus rewards the litigious and penalizes the reasonable.

Finally, the Ninth Circuit's rule offends all notions of judicial economy. By impeding employers and employees from voluntarily and expeditiously settling employment claims (not just age discrimination claims),[16] the court of appeals' decision frustrates the public policy favoring voluntary settlement which underlies our employment discrimination laws, the EEOC regulations, Federal Rule of Evidence 408, and analogous state evidence code provisions.[17]

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[15] The release offered in this case fulfilled each of the EEOC's criteria for assessing the validity of a release. *See* note 8 *supra*.

[16] The Ninth Circuit's ruling regarding the applicability of Rule 408 to settlement agreements apparently is not limited to age discrimination claims.

[17] The overriding purpose of Rule 408 is to promote the "public policy favoring the compromise and settlement of disputes." Fed. R. Evid. 408, Advisory Comm. Notes.

III

IF THE COURT WERE UNSURE ABOUT THE IMPORTANCE OF RESOLVING THE QUESTION PRESENTED, IT SHOULD REQUEST THE VIEWS OF THE EEOC AND THE SOLICITOR GENERAL BEFORE CONSIDERING THE PETITION FOR CERTIORARI

Employers are being pulled in two directions. The Ninth Circuit has held that specifying an ADEA waiver in a proposed release is "probative [evidence] on the issue of discrimination." 817 F.2d at 1342. The EEOC, on the other hand, has made clear that an ADEA waiver will not be enforceable unless the document "clearly waive[s] the employee's rights under the ADEA." 29 C.F.R. § 1627.16(c)(2)(i). Thus, as the law now stands, the EEOC is instructing employers that releases, to be effective, must contain specific waiver language;[18] the Ninth Circuit, however, says that to include such language essentially is to admit guilt.

Guidance from this Court is needed. If the Court has any doubt about the importance of reviewing the Ninth Circuit's decision, it should request the views of the EEOC and the

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[18] The language of a general release is more probative of the thoroughness of an employer's legal counsel than of the employer's discriminatory intent. Even without the EEOC rule, competent attorneys of course make releases as comprehensive as possible in order to foreclose any possibility of litigation. The all-inclusive language resulting from such thoroughness purposely will have been drafted to enumerate any conceivable basis upon which a claim potentially might be brought. *See EEOC v. United States Steel Corp.*, 583 F. Supp. 1357 (W.D. Pa. 1984) (release must identify the specific nature of the claim or claims being waived).

Solicitor General before considering the petition for certiorari.

IV

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to grant the petition and reverse the judgment below.

DATED: December 28, 1987

Respectfully submitted.

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